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No. 87-1742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TERRE DU LAC ASSOCIATION, INC.,
Petitioner,

vs.

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATES, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
Introduction	1
I. An Enterprise Infected By Pervasive Criminal Activity Cannot Escape The Reach Of RICO Because It Is So Thoroughly Infected	2
II. The Court Of Appeals Has Already Determined That The Association Sufficiently Alleged Injury Flowing From Responents' Violations Of 18 U.S.C. § 1962	5
III. C.I.T. Corporation Has Not Been Absolved Of Liability	6
Conclusion	7

TABLE OF AUTHORITIES CITED

	Page
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)	1,5
Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985), *cert. denied* 475 U.S. 1082 (1986)	2,5,6
Terre Du Lac Association, Inc. v. Terre Du Lac, Inc. 737 S.W.2d 206 (Mo. App. 1987)	6
United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1986)	4
18 U.S.C. § 1962(a)	5,7
18 U.S.C. § 1962(c)	4
18 U.S.C. § 1964	2

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INTRODUCTION

Respondents apparently concede that the reasons for issuance of the writ stated in Terre Du Lac Association, Inc.'s (the "Association") Petition are well grounded. They do not dispute that the Court of Appeals' resolution of the issue presented for review conflicts with the decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1983). They do not deny the existence of a conflict between the Court of Appeals' resolution of that issue in this case and other courts of appeals' resolution of the same issue in other cases. They do not suggest that

justice is served when similarly situated plaintiffs have claims arising under the same statute disposed of based upon inconsistent applications of that statute.

Instead, relying on arguments made (but not accepted by any court) in the proceedings below, and on one argument expressly rejected by the Court of Appeals (in *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 472-73 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986)), Respondents assert that, for one reason or another, "no Circuit Court of Appeals would conclude that this Complaint states a cause of action under RICO." Respondents Brief at 6. ("Resp. Br."). On that basis, Respondents predict that regardless of the resolution of the issue presented for review, the Association will not ultimately prevail on its claim under 18 U.S.C. § 1964. Presuming the accuracy of that prediction, Respondents contend that ultimate justice will best be served by denying the Association's Petition.

The probable accuracy of Respondent's prediction may be judged by the fact that, not withstanding the bold assertion quoted above, Respondents have not cited even a single decision of the Ninth Circuit Court of Appeals or the District of Columbia Circuit Court of Appeals that would substantiate their claim. As explained herein, the legal arguments upon which Respondents base the claim that they will prevail are of dubious merit when applied to the actual allegations of the Association's Complaint, rather than to Respondents' characterizations of those allegations.

I.

An Enterprise Infected By Pervasive Criminal Activity Cannot Escape The Reach Of RICO Because It Is So Thoroughly Infected.

Respondents' initial argument in support of their prediction of ultimate victory is based on the proposition that their organizations were so infected with criminal activity and

criminal purposes that they cannot properly be considered "enterprises" as that term is used in RICO. In essence, they argue that if an organization is sufficiently evil, it and its members can escape the reach of the very laws which, earlier in their brief, Respondents contended were only intended to reach the worst criminal elements of our society. The argument is not only preposterous on its face, it is predicated on a mischaracterization of the record in this case, and of the very decision of this Court that is cited in support of the argument.

Contrary to Respondents' statement, the Association has never alleged that "there is no purpose or structure [for Respondents and their enterprises] separable from" Respondents' pattern of racketeering activity. Resp. Br. at 10. Rather, the Association alleged that:

> "TDL [and the other defendants] have associated themselves one with another for the common purpose of marketing and facilitating the marketing of lots located in the Terre Du Lac subdivision development, and of operating the Terre Du Lac subdivision development, its amenities and utilities, all for their collective and mutual profit."

Resp. Br. at A-27 (Amended Complaint, ¶ 121). The Association further alleged that Respondents chose to market the lots in interstate commerce based on fraudulent representations, rather than through legitimate means. Resp. Br. at A-28 (Amended Complaint ¶ 128).

The fact that Respondents chose to accomplish an otherwise legal objective (the sale of parcels of real estate) through illegitimate means, does not mean that the organization they created to accomplish the desired end result has as its sole purpose the perpetration of a pattern of racketeering activity. It means only that the organization or those persons who control it chose to accomplish its purpose in an illegitimate fashion. This type of conduct — operation of otherwise legitimate businesses through

illegitimate means — is precisely the type of conduct which 18 U.S.C. § 1962(c) prohibits.

Even if, as Respondents now contend, their organization is so infected with criminal purposes that it does nothing but engage in a pattern of racketeering activity, that would not be fatal to the Association's RICO claim. In *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), this Court specifically held that there may be an identity between the facts which establish the existence of the enterprise, and those which establish the pattern of racketeering activity, observing:

> "That a wholly criminal enterprise comes within the ambit of the statute does not mean that a 'pattern of racketeering activity' is an 'enterprise.' In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed, Supp. III) The former is *proved by evidence* of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter *is proved by evidence* of the requisite number of acts of racketeering committed by the participants in the enterprise. *While the proof used to establish these separate elements may in particular cases coalesce,* proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government."

452 U.S. at 583, 69 L.Ed.2d at 254-55 (emphasis supplied).

It is too soon in this case to argue whether the evidence at trial will sufficiently establish the existence of Respondents' "enterprise" within the meaning of RICO. Respondents' vigorous and heretofore successful efforts to avoid the presentation of evidence of their RICO violations precludes that analysis at the present time. At this time, it is sufficient that the Amended Complaint alleges the existence of such an enterprise. *See, e.g. Sedima,* 105 S.Ct. at 3285, 87 L.Ed.2d at 358-59. The proof that there is both an enterprise and a pattern of racketeering activity must await a trial. *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772 F.2d at 474.

II.

The Court Of Appeals Has Already Determined That The Association Sufficiently Alleged Injury Flowing From Respondents' Violation of 18 U.S.C. § 1962.

Respondents' arguments concerning connection between their violations of 18 U.S.C. § 1962(a) and the proximate cause (and existence) of the Association's injury are similarly susceptible to refutation.

Respondents' actions followed a classic pattern in real estate development. First, Respondent Terre Du Lac, Inc. ("TDL") acquired a large tract of land. With the assistance of the other Respondents, it began to improve it, and proceeded to sell lots in the development on the strength of promises of what the development would be like in the future. The source of funds necessary to pay for these promised, future improvements, however, was not (it now appears) to be the vast resources already available to Respondents C.I.T. Corp. ("C.I.T.") and Sensibar Enterprises, Inc. ("SEI"). Rather, the funds with which to pay for promised future improvements, as with all of TDL's expenditures, were expected to come (if at all) from the proceeds of prospective property sales.

While lots were successfully sold on the strength of Respondents' promises, the funds generated by those sales were

not applied to fulfill those promises. Rather, Respondents diverted the proceeds of their sales efforts from investment in the infrastructure of the Development, and invested their ill-gotten gains in SEI and C.I.T.

As the Court of Appeals recognized in its first decision in this case, this investment of the proceeds of Respondents' frauds in their own operations, thereby diverting the funds from their proper purpose, injured the Association. *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772 F.2d at 472. This Court denied Respondents' request for review of that decision. 475 U.S. 1082.

Having lost the issue when they framed it in terms of standing on the first appeal in this case, Respondents now argue that the Association's injury stemmed *only* from the diversion of the funds from their proper purpose, not from the investment of the proceeds in C.I.T.'s and SEI's activities in interstate commerce. This argument fails to recognize that the diversion/investment characterizations are simply two sides of the same coin. The improper investment of the proceeds effected the diversion of the funds. Since the Court of Appeals has already held that the Association has adequately alleged an injury flowing from the diversion, Respondents' recast arguments to the contrary are not sufficient reason to deny the Association's Petition.

III.

C.I.T. Corporation Has Not Been Absolved Of Liability

Finally, C.I.T. Corporation asserts that, in any event, there is no basis for continuing this case as to itself in view of the decision in *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d 206 (Mo. App. 1987). Contrary to C.I.T.'s contention, that decision does not hold that C.I.T. is not a joint venturer with TDL. Rather, the case held that the Association's Petition in that case did not plead sufficient facts to support the

Association's allegation that C.I.T. was a joint venturer with TDL.[1]

Whether that decision precludes the Association from pursuing claims against C.I.T. based on its status as a joint venturer of TDL is an issue that no court, state or federal, has heretofore confronted. That issue is not presented to this court in this case either. But even if the issue is resolved adversely to the Association, the Association's claim based on C.I.T.'s violation of 18 U.S.C. § 1962(a) would survive, as it does not depend upon C.I.T.'s status as a joint venturer. Thus, assuming a favorable resolution of the issue presented for review in this case, the Association will be able to proceed against C.I.T. and the other Respondents.

CONCLUSION

This Court has already indicated, by issuing its writ in *H. J. Inc. v. Northwestern Bell Telephone Co.*, No. 87-1252, that the issue presented in this case merits resolution by this Court.[2] Whether or not, apart from this issue, any fatal and incurable defect exists in the Association's Complaint has not been decided by any court at this juncture.

The Association does not ask that the Court resolve the issues raised by Respondents' arguments without benefit of prior

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[1] Missouri's rules of procedure require fact, rather than notice pleading. *See* Rule 55.05, Mo. R. Civ. P.

[2] Unlike the case of *H. J. Inc.*, however, the facts of this case clearly present the issue of whether predicate acts of racketeering activity committed pursuant to a single scheme can constitute a "pattern of racketeering activity". Notwithstanding the Court of Appeals' contrary conclusion, it is possible to view the predicate acts of racketeering activity alleged by the plaintiffs in *H. J. Inc.* to be parts of separate schemes. *See* Brief of Petitioners, *H. J. Inc. v. Northwestern Bell Telephone Company*, No. 87-1252 at p. 10.

analysis by the District Court or the Court of Appeals. Rather, the Association requests that its Petition be determined on its merits, which Respondents have not drawn into question, rather than upon the ancillary considerations put forward by Respondents.

In view of the possibility that the decision below is, as the Association believes, erroneous, the Court should issue its writ to assure that when the Association's claim is finally resolved, it is resolved based on a correct, rather than an erroneous, application of RICO.

Respectfully submitted,
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